Ling Sie Kiong, The Liquidator v SG & Sons Sdn Bhd

HIGH COURT (KUALA LUMPUR) — POST WINDING UP APPLICATION NO WA-28PW-251–07 OF 2020
NADZARIN WOK NORDIN JC
10 FEBRUARY 2021

Companies and Corporations — Winding up — Proof of debt ('POD') — Wound-up company's only asset was a strata unit that had been lying vacant since the date it was wound up by order of court in 1997 — Local authority filed POD in the winding up claiming assessments unpaid by the company on the property from 1999–2017 — Liquidator of company applied to court to exclude the POD claim on the ground the local authority's claim was a post winding up order debt — Whether liquidator's contention was correct — Whether local authority's contention that assessment payments under the Local Government Act 1976 constituted a 'federal tax' that ranked sixth in order of priority of payment over other debts under s 292(1)(f) of the Companies Act 1965 was misconceived

The respondent company was wound up by order of court on 10 December 1997. The only asset the company owned was a strata unit in a commercial tower in Kuala Lumpur ('the property') which had been lying vacant at least since the date of the winding up. After the petitioner took over from the official receiver ('OR') as liquidator of the respondent in 2019, he tendered the property for sale and finally sold it in January 2020 for RM1m. Whilst the respondent was still under the OR, the Dewan Bandaraya Kuala Lumpur ('DBKL'), as the local authority, had filed a proof of debt ('POD') in the winding up claiming RM55,030 as unpaid assessment on the property from 1999 until 2017. In the instant notice of motion, the petitioner sought directions under, inter alia, ss 291–292 of the Companies Act 1965 and s 619(6) of the Companies Act 2016 that: (a) DBKL was not entitled to its POD claim; and (b) in the event the court allowed the POD claim in full or in part, the amount be reckoned as an unsecured debt for which DBKL shall rank equally with other unsecured creditors of the respondent pursuant to s 292 of the Companies Act 1965 subject to the availability of funds and not at any earlier date and/or prior to the date of notice of declaration of dividends. The petitioner stated that DBKL was not entitled to the POD sum because it was a post winding up debt. DBKL resisted the application saying that the arrears of assessment owed by the respondent constituted a 'federal tax' under s 292(1)(f) of the Companies Act 1965 and therefore ranked sixth in order of priority of payment over other debts. DBKL also submitted that since its POD was never rejected, the petitioner was estopped from questioning the claimed sum in his application.

Held, allowing the notice of motion:

(1) DBKL was only entitled to payments of assessments on the property up to the date of the respondent's winding up order, ie, 10 December 1997. Its POD amount for RM55,030 for the period 1999 until 2017 could not under the law be claimed from the respondent (see para 55).

(2) Although property owners were statutorily obliged under ss 146 and 147 of the Local Government Act 1976 ('the LGA') to pay rates in respect of their properties to the local authority for so long as they remained the owners thereof, under the Companies Act 1965 ('the CA') the effective date for the purpose of determining the debt or liability of an insolvent company in liquidation by order of court was the date of the winding up order. The conflict between the two laws was resolved by application of the maxim *generalibus specialia derogant*, whereby the CA, being the specific statute and which contained provisions in respect of debts provable in a winding-up, would exclude the operation of ss 146 and 147 of the LGA. Hence any debts due by the respondent must relate to amounts which were incurred by the respondent prior to the commencement of the winding up (see paras 45–48).

(3) An estoppel could not be created as against statutory provisions. Hence, DBKL could not raise the doctrine of estoppel against any issue concerning the priorities of claims under s 292(2) of the Companies Act 1965 and the fact that the OR had not rejected its POD did not bar the petitioner or the court from deciding on DBKL's entitlement as to the amount owed as arrears of assessment (see paras 14 & 17).

(4) Any assessment or rates imposed under the LGA was not a federal tax due to the government within the context of the Federal Constitution. Pursuant to ss 39–40 of the LGA, rates were part of the revenue of a local authority which was constituted as a local authority fund which became vested in the local authority and over which the local authority had direction and control (see paras 37–39).

[Bahasa Malaysia summary

Responden syarikat digulungkan melalui perintah mahkamah pada 10 Disember 1997. Satu-satunya aset yang dimiliki adalah satu unit strata dalam satu bangunan komersil di Kuala Lumpur ('hartanah tersebut') yang telah kosong sejak tarikh penggulungan. Seleaps pempetisyen mengambil alih daripada pegawai penerima ('PP') sebagai penyelesai responden pada tahun 2019, dia telah menyerahkan hartanah tersebut untuk dijual dan akhirnya berjaya untuk menjualnya untuk jumlah RM1 juta. Manakala responden masih di bawah PP, Dewan Bandaraya Kuala Lumpur ('DBKL'), sebagai pihak berkuasa tempatan, telah memfailkan bukti hutang ('BH') dalam tuntutan penggulungan menuntut RM55,030 sebagai taksiran yang belum dibayar pada hartanah tersesbut dari tahun 1999 sehingga 2007. Dalam notis usul di sini,

pempetisyen memohon untuk arahan di bawah antaranya, ss 291–292 Akta Syarikat 1965 dan s 619(6) Akta Syarikat 2016 bahawa: (a) DBKL tidak berhak kepada tuntutan BH tersebut; dan (b) dalam keadaan mahkamah membenarkan tuntutan BH sepenuhnya atau sebahagiannya, jumlah yang dikatakan sebagai satu hutang tak bercagar yang mana DBKL akan mempunyai taraf yang sama degan pemiutang tak bercagar responden yang lain selaras dengan s 292 Akta Syarikat 1965 tertakluk kepada kewujudan wang dan bukan pada mana-mana tarikh lebih awal dan/atau sebelum tarikh notis pengisytiharan dividen. Pempetisyen menyatakan bahwa DBKL tidak layak kepada jumlah BH tersebut kerana ianya selepas penggulungan. DBKL melawan permohonan tersebut mengatakan bahawa tunggakan taksiran terhutang kepada responden terjumlah kepada cukai persekutuan di bawah s 292(1)(f) Akta Syarikat 1965 dan oleh itu mempunyai nombor keeman dalam senarai prioriti penbayaran terhadap hutang lain. DBKL juga menghujahkan bahawa sejak BH tersebut tidak pernah ditolak, pempetisyen diestop daripada mempersoalkan tuntutan dalam permohonannya.

Diputuskan, membenarkan notis usul:

(1) DBKL hanya berhak kepada pembayaran taksiran hartanah tersebut sehingga tarikh perintah penggulungan, iaitu 19 Disember 1997. Jumlah RM55,030 BH untuk tempoh 1999 hingga 2017 tidak boleh di bawah undang-undang dituntut oleh responden (lihat perenggan 55).

(2) Walaupun pemilik hartanah tersebut secara undang-undang mempuyai tanggungjawab di bawah ss 146–147 Akta Kerajaan Tempatan 1976 ('AKT') untuk membayar kada berkaitan dengan hartanah mereka kepada pihak berkuasa tempatan selagi mana mereka kekal sebagai pemiliknya, dibawah Akta Syarikat 1965 ('AS') tarikh efektif untuk tujuan menentukan hutang atau liabiliti satu syaikat tidak solven dalam penggulungan melalui perintah mahkamah adalah pada tarikh perintah penggulungan. Percanggahan antara dua undang-undang diselesaikana melalui penggunaan maxim *generalibus specialia derogant*, yang mana CA, yang merupakan statut spesifik dan yang mengandungi peruntukan berkaitan dengan hutang yang dibuktikan dalam penggulungan akan mengecualikan peruntukkan ss 146 dan 147 AKT. Oleh yang demikian, apa-apa hutang yang terjumlah oleh responden harus berkaitan dengan amaun yang terakru oleh responden sebelum pemulaan penggulungan (lihat perenggan 45–48).

(3) Satu estopel tidak akan dicipta melanggar peruntukan statutory. Oleh itu, DBKL tidak boleh membangkitkan doktrin estopel terhadap apa-apa isyarat berkaitan dengan kepentingan tuntutan di bawah s 292(2) Akta Syarikat 1965 dan fakta bahawa PP tidak menolak BH tersebut tidak menghalang pempetisyen atau mahkamah daripada memutuskan kelayakkan DBKL kepada jumlah terhutang sebagai

tunggakan taksiran (lihat perenggan 14 & 17).

(4) Apa-apa taksiran atau kadar yang ditetapkan di bawah AKT bukan satu cukai persekutuan kepada kerahaan didalam konteks Perlembagaan Persekutuan. Selaras dengan ss 39 dan 40 AKT, kadar merupakan sebahagian daripada hasil pihak berkuasa tempatan yang membentuk tabung pihak berkuasa tempatan yang terletak hak dengan pihak berkuasa tempatan yang mana pihak berkuasa tempatan mempunyai arahan dan kawalan (lihat perenggan 37–39).]

Cases referred to

Abdul Aziz bin Mohamed Ginan & 108 Ors v Datuk Bandar Kuala Lumpur [2007] 3 MLJ 12, HC (folld)

Anuarul Aini & Anor v Ketua Pengarah Kastam dan Eksais Diraja Malaysia, Johore Bahru [1991] 1 MLJ 360; [1991] 2 CLJ Rep 278, HC (distd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)

Campal Industries Sdn Bhd; Perdana Merchant Bankers Bhd (Applicant), Re [1997] 3 CLJ Supp 140, HC (distd)

Datuk Bandar Kuala Lumpur v Kwong Choon Ying [2013] MLRHU 1076 (refd)

Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in Liquidation) [1995] 2 MLJ 600; [1995] 3 CLJ 316, SC (distd)

Hotel Ambassador (M) Sdn Bhd v Seapower (V) Sdn Bhd [1991] 1 MLJ 404; [1991] 1 CLJ Rep 174, SC (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719; [1995] 3 CLJ 520, CA (folld)

Majlis Amanah Ra'ayat v Official Receiver, Malaysia [1984] 1 MLJ 173; [1984] 1 MLRA 151, FC (folld)

Majlis Daerah Dungun v Tenaga Nasional Bhd [2006] 4 MLJ 731; [2006] 2 CLJ 1078, CA (refd)

Majlis Perbandaran Pulau Pinang v Tropiland Sdn Bhd [2003] 6 MLJ 387; [2003] 3 MLRH 178; [2003] 1 LNS 346 (refd)

Majlis Perbandaran Sebarang Perai v Pengurusan Danaharta Nasional Bhd; Ascot Frontiers Sdn Bhd (Third Party) [2015] 7 CLJ 354, HC (refd)

Rethi Development Sdn Bhd v Majlis Perbandaran Seberang Perai [2013] 10 MLJ 916, HC (distd)

SWI Realty Sdn Bhd v Jabatan Perkhidmatan Pembentungan & Others [2003] MLJU 418, HC (distd)

Tan Suan Choo v Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323 (refd)

United Plantations Bhd v Majlis Daerah Sabak Bernam [2020] MLJU 497; [2020] 6 CLJ 801, HC (refd)

Wong Chu Lai v Wong Ho Enterprise Sdn Bhd (in liquidation) and another appeal [2020] 5 MLJ 762, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 237(3), 291, 292, 292(1), (1)(f), (2)
Companies Act 2016 s 619(6)
Federal Constitution arts 74, 96, Ninth Schedule
Government Proceedings Act 1956 s 2
Local Government Act 1976 ss 2, 10, 39, 40, 127, 146, 147, 151
National Land Code s 268
Companies (Winding Up) Rules 1972 r 92
Sales Tax Act 1972 (repealed by Goods and Service Tax 2014)
Sewerage Services Act 1993 (repealed by Water Services Industry Act 2006)

Pamela Ephraim (Ephraim & Assoc) for the petitioner.
Zirwatul Hanan bt Abdul Rahman (Azaine & Fakhrul) for the respondent.

Nadzarin Wok Nordin JC:

INTRODUCTION

[1] Before this court is a notice of motion dated 6 July 2020 in encl 1, filed by the liquidator ('liquidator') of the respondent company ('respondent') for an order pursuant to ss 291, 292 and 237(3) of the Companies Act 1965, s 619(6) of the Companies Act 2016 and/or inherent juris of the court seeking directions from this court ('application') that, inter alia:

(a) Dewan Bandaraya Kuala Lumpur ('DBKL') shall waive the full payments of assessment lodged in their proof of debt for RM55,030 ('POD') for the period 1999 until 1 September 2017 for Unit 1, No 1, Level 20th floor, Block A aka Bangsar Tower/Menara Bangsar bearing postal address 299–20–1, Jalan Maarof, Menara Bangsar, Bukit Bandaraya ('the property') from date of winding up order till the date the property is disposed of; and

(b) if the POD is allowed in full or in part, the said amount shall be an unsecured debt and DBKL shall rank equally with other unsecured creditors of the respondent pursuant to s 292 of the Companies Act 1965 and subject to availability of funds and not at any earlier date and/or prior to the date of the notice of declaration of dividends.

[2] The grounds on which the application is relied on are, inter alia, as follows:

(a) the respondent was wound up on 10 December 1997 ('winding up order') and the official receiver ('OR') appointed as the provisional liquidator;

(b) Ling Sie Kiong ('LSK') was appointed as liquidator by way of a court order dated 25 March 2019;

(c) there is only one asset of the respondent being the said property;

(d) only after the appointment of LSK and after carrying out several tender process for the sale of the property, that the property was sold on 29 January 2020; and

(e) the property had been vacant and left abandoned and did not generate any income and/or was not disposed of at an earlier stage after the winding up order, there should be a waiver or reduction on the assessment imposed by DBKL.

[3] DBKL asserts that the liquidator by filing this application had hijacked and sabotaged DBKL's rights as a creditor of the respondent.

BACKGROUND FACTS

[4] The respondent is a company incorporated in Malaysia and is in the business of interior decorating and renovation works and is the owner of the property.

[5] After more than 20 years the only asset of respondent is the property.

[6] After appointment of LSK as the liquidator of the respondent on 25 March 2019, and after carrying out several tender process for the sale of the property, the property was sold on 29 January 2020 for RM1m.

[7] On 24 April 2019 the liquidator had written to DBKL requesting them to lodge any claims with the liquidator and DBKL had thereafter lodged their POD with the liquidator on 8 February 2020 for the sum of RM55,030 being arrears of assessment for the period 1999 to 1 September 2017.

[8] It was argued by the liquidator that the sums claimed by DBKL are post winding up and not debts that had accrued before the winding up order.

DBKL'S REPL Y

[9] DBKL had, inter alia, submitted that:

(a) the company was statutorily obliged/liable to pay the assessment for the property pursuant to s 146 of the Local Government Act 1976 ('the LGA 1976');

(b) DBKL as the local authority was at all material times entitled to claim the said assessment which needs to be paid twice yearly (post and pre winding up);

(c) the OR had never rejected DBKL's POD and the liquidator is therefore estopped from claiming that a waiver had occurred after the said property was sold; and

(d) the liquidator had never seeked the confirmation from DBKL or its lawyers as to the amount of assessment owed.

COURTS FINDINGS

DBKL as a creditor

[10] This court has examined the POD of DBKL which can be found at exh LSK5 of encl 2 being the affidavit in support of the liquidator, and of which attached to the POD is a statement of account from DBKL with regards the property which states (in Bahasa Malaysia) as follows:

	Debit	Baki
		RM53,538
Cukai Taksiran Am 1.1.2017 — 30.6.2017	RM732	RM54,270
Caj denda Lewat Penggal Pertama pada 1.3.201	RM14	RM54,284
Cukai Taksiran Am 1.7.2017 — 31.12.2017	RM732	RM55,016
Caj denda Lewat Penggal Kedua pada 1.9.2017	RM14	RM55,030

[11] It is clear that the arrears of assessment which is being seeked by DBKL under their POD stems from arrears which are due right up to the period 31 December 2017.

[12] Is DBKL a creditor? From the POD it would prima facie appear that DBKL is a creditor by virtue of the arrears of assessment due from the respondent.

DBKL's contentions

[13] As to the 'Perintah Penerimaan Petisyen Pemiutang dan Perintah Penghukuman Petisyen bertarikh 10 Disember 1997' referred to by DBKL in its POD, this court believes that the reference therein has wrongly referred to the winding up order herein as a 'Perintah Penerimaan Petisyen Pemiutang dan

Perintah Penghukuman Petisyen' as there is no evidence before this court of any other court order against the respondent other than the winding up order on 10 December 1997.

[14] I will now address DBKL's contention that an estoppel has been created when the official receiver had not rejected their POD and therefore the liquidator cannot raise the issue of waiver after the property had been sold. Firstly, it is trite that an estoppel cannot be created as against statutory provisions. I make reference to the Supreme Court case of *Hotel Ambassador (M) Sdn Bhd v Seapower (V) Sdn Bhd* [1991] 1 MLJ 404 at p 407; [1991] 1 CLJ Rep 174, Hashim Yeop Sani CJ (Malaya) held as follows:

> On the question of issue estoppel we agree with the learned judge that on the facts of this case the appellants cannot invoke the doctrine of issue estoppel. There can be no estoppel as against statutory provisions.

[15] See also *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75, where the Federal Court reiterated the principle that no estoppel can operate against statute, where Gopal Sri Ram JCA (as he then was) observed (at the headnotes) that:

> ... it is well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law ...

[16] It was also ruled by the Court of Appeal in *Wong Chu Lai v Wong Ho Enterprise Sdn Bhd (in liquidation) and another appeal* [2020] 5 MLJ 762, that:

> ... no estoppel can apply to the liquidator who was expected to carry out his statutory functions of ascertaining the debts of the company and its assets and then paying to its true creditors.

[17] Thus this court holds that the doctrine of estoppel cannot be raised against any issue concerning the priorities of claims under s 292(2) of the Companies Act 1965 and the fact that the official receiver had not rejected their POD does not bar the liquidator or this court from deciding on the entitlement of DBKL as to the amounts owed as the arrears of assessment.

Rates under the Local Government Act

[18] Section 2 of the Local Government Act 1976 ('the LGA') defines the words 'local authority' and 'owner' respectively as follows:

> 'local authority' means any City Council, Municipal Council or District Council, as the case may be, and in relation to the Federal Territory means the Commissioner of the City of Kuala Lumpur appointed under section 3 of the Federal Capital Act 1960

'owner' —

(a) in relation to any land or building, means the registered proprietor of the land and, if in the opinion of the local authority the registered proprietor of the land cannot be traced, the person for the time being receiving the rent of the premises in connection with which the word is used whether on his own account or as agent or trustee for any other person or as receiver or who would receive the same if such premises were let to a tenant.

[19] I now come to the case of *Abdul Aziz bin Mohamed Ginan & 108 Ors v Datuk Bandar Kuala Lumpur* [2007] 3 MLJ 12 where Mohd Hishamuddin J (as he then was) held after applying the analysis laid down by Edgar Joseph Jr (as he then was) in *Tan Suan Choo v Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323:

[66] Now, the office of Datuk Bandar is established by s 4 of the Federal Capital Act 1960. His function is to administer the city of Kuala Lumpur. He is a corporation sole by virtue of s 5(1) of the Federal Capital Act. He has his own legal personality independently of the government; and, independently of the government, he may sue and be sued. He may enter into contracts. He has a common seal. The Datuk Bandar is a local authority for the purposes of the Local Government Act 1976. The functions, powers and duties of the Datuk Bandar, as a local authority, are set out in the Federal Capital Act and, more extensively, in the Local Government Act. In my judgment, having examined the provisions of the Federal Capital Act and the Local Government Act, I take the view that the Datuk Bandar is a mere statutory authority, a local government; but it is not a department of the government like, say, the Road Transport Department, the Immigration Department, the Police Department or the Department of Customs and Excise ... In so holding I adopt the view and analysis of Edgar Joseph Jr J (as he then was) in Tan Suan Choo.

[20] I respectfully hold and adopt His Lordship Mohd Hishamuddin J (as he then was) reasoning in *Abdul Aziz bin Mohamed Ginan & 108 Ors* that DBKL is a local authority for the purposes of the LGA and under the definition as provided under the LGA.

[21] Before me, DBKL has argued that the arrears of assessment owed by the respondent to DBKL is a federal tax and is therefore covered by the said sub-s 292(1)(f) of the Companies Act 1965 and is consequently to be treated as a sixth ranking priority debt which is to be paid over and above all other debts as an assessment is pursuant to s 146 of the Local Government Act 1976 ('the LGA 1976') which states that:

All rates shall be paid by the persons who are the owners of the holding for the time being, and until so paid shall, subject to the provisions of the National Land Code, be a first charge on the holdings in respect of which they are assessed, and if not paid within the prescribed time, shall be recoverable in the manner hereinafter prescribed.

[22] I have thus considered and read the LGA 1967 and am of the view that any claim for assessment or rates which is claimed by DBKL can only be made pursuant to s 127 of the Local Government Act which provides:

> The local authority may, with the approval of the State Authority, from time to time as is deemed necessary, impose either separately or as a consolidated rate, the annual rate or rates within a local authority area for the purposes of this act or for other purposes which it is the duty of the local authority to perform under any other written law.

[23] A local authority is duty-bound under the LGA, in particular s 146 of the LGA, to collect rates from owners of holdings', see the case of *United Plantations Bhd v Majlis Daerah Sabak Bernam* [2020] MLJU 497; [2020] 6 CLJ 801; Wong Khian Kheong J.

[24] Whereas in *Majlis Daerah Dungun v Tenaga Nasional Bhd* [2006] 4 MLJ 731; [2006] 2 CLJ 1078 the Court of Appeal held:

> [33] Thus, pursuant to the provisions of the Act, the local authority's duty is to impose the annual rate or rates within its local authority area for the purposes of the Act and the duty of an owner of a holding within the local authority area is to pay for the assessment at the rate determined by the local authority.

[25] I was referred by counsel for DBKL to *Majlis Perbandaran Pulau Pinang v Tropiland Sdn Bhd* [2003] 6 MLJ 387; [2003] 3 MLRH 178; [2003] 1 LNS 346 wherein the issue was whether the first charge meant a registered first charge, the learned judge, Su Geok Yiam JC (as she then was) held that:

> In my view by using the words 'first charge over the holdings' in s 146 of the LGA it is the intention of parliament to confer upon the local authority, the plaintiff in the instant appeal, priority over all debts owing to persons who have proprietary interests in the holdings upon a sale of the holdings to give effect to the first charge of an amount equivalent to the outstanding amount of rates and arrears of rates due and owing to the plaintiff by the owner of the holdings, the defendant in the instant appeal, together with interest thereon at 6% pa and costs. This priority is over and above that which is provided for in s 268 of the NLC which expressly provides for a scheme of ranking which recognizes the priority of rent payable to the state authority or the lessor and rates payable to a local authority in respect of the application of purchase money arising on any sale of any land subject to a voluntary charge or registered charge or legal charge pursuant to chapter 3 of part 16 of the NLC.

[26] In another case being *Datuk Bandar Kuala Lumpur v. Kwong Choon Ying* [2013] MLRHU 1076, it was held that:

> The term 'charge' has not been defined in the LGA but according to the Oxford Compact English Dictionary (2nd Ed) the term 'chargee', inter alia, means 'demand (an amount) as a price for service rendered or goods supplied'. Applying the Oxford

> Dictionary meaning to s 146 of the LGA, it means that the local authority has the right to make the first demand on the holding should the holding be ever sold by public auction pursuant to s 257 of the NLC. However, s 146 of the LGA does not empower the local authority to apply for an order for sale under the NLC when there is no agreement on a chargee (which chargee should subsequently be registered) between the plaintiff and the defendant. In fact, s 146 of the LGA goes on further to provide that if the rate remains unpaid, it 'shall be recoverable in the manner hereinafter prescribed', which means as prescribed in ss 148, 149 and 151 of the LGA. Clearly, s 146 of the LGA does not provide for the local authority to recover the unpaid rate under s 257 of the NLC when there is no evidence of breach of the terms of a registered chargee by the defendant as a chargor.

[27] It must be noted that both *Majlis Perbandaran Pulau Pinang v Tropiland Sdn Bhd* and *Datuk Bandar Kuala Lumpur v Kwong Choon Ying* did not concern a matter of priority in a winding up situation, and it is my view that the 'priority over all debts owing to persons who have proprietary interests in the holdings' in *Majlis Perbandaran Pulau Pinang v Tropiland Sdn Bhd* was decided in the context of and in relation to the issue of priority over and above that which is provided for in s 268 of the National Land Code where the plaintiff therein instituted proceedings against the defendant pursuant to s 151 of the LGA for the attachment and sale of the property in order to recover the arrears of rates together with interest thereon and costs, and in the latter case where Yeoh Wee Siam J (as she then was) had to decide on a plaintiff's application for an order for sale of the defendant's property by public auction in order to realise the amount of arrear of rate or assessment owed to the plaintiff by the defendant, as the local authority, under s 151 of the LGA.

[28] After reading the aforesaid mentioned cases, I hold that the s 146 of the LGA 'first charge over the holdings' does not apply to priorities under s 292(1)(f) of the Companies Act 1965 as the words of the said s 146 of the LGA does not provide that arrears of rates under the LGA shall rank in priority to other debts, but only that it shall be a 'first charge on the holdings'.

Is the assessment a federal tax

[29] Under the Companies Act 1965, s 292(1) of the Companies Act 1965 provides for claims which are to be paid in priority to all other unsecured debts and s 292(1)(f) of the Companies Act 1965 thereof provides that:

> Subject to this act, in a winding up there shall be paid in priority to all other unsecured debts ... (f) sixthly, the amount of all federal tax assessed under any written law before the date of the commencement of the winding up or assessed at any time before the time fixed for the proving of debts has expired.

[30] Article 96 of the Federal Constitution provides that:

No tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law.

[31] Under art 74 of the Federal Constitution pertaining to the subject matter of federal and state law it is further provided that:

(i) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

[32] A reading of the First and Third List as set out in the Ninth Schedule suggest that there is no reference thereto to any matters concerning the purview of local government and by implication thereto no reference is made to any assessments or rates under the LGA.

[33] With due respect I was referred to by counsel for the liquidator to *Rethi Development Sdn Bhd v Majlis Perbandaran Seberang Perai* [2013] 10 MLJ 916 and *SWI Realty Sdn Bhd v Jabatan Perkhidmatan Pembentungan & Others* [2003] MLJU 418 which I found were not relevant to the matter before me as the *Rethi Development Sdn Bhd* was a matter which was decided by the Appeal Board and not a Superior Court of law whilst the *SWI Realty Sdn Bhd* matter involved whether a contribution of RM368,300 as costs of the infrastructure of a future treatment plant was payable by the plaintiff therein under the Sewerage Services Act 1993 wherein the court therein held that it was unable to identify any general provision, let alone a specific one which indicated that the Sewerage and Services Act 1993 was a tax, duty, or levy imposing statute, and which had empowered the Director General to do just that.

[34] I was alternatively referred by counsel for DBKL to *Anuarul Aini & Anor v Ketua Pengarah Kastam dan Eksais Diraja Malaysia, Johore Bahru* [1991] 1 MLJ 360; [1991] 2 CLJ Rep 278 and *Re Campal Industries Sdn Bhd; Perdana Merchant Bankers Bhd (applicant)* [1997] 3 CLJ Supp 140 as well as *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in Liquidation)* [1995] 2 MLJ 600; [1995] 3 CLJ 316. I have considered all the said cases cited and find that they are inapplicable herein as *Anuarul Ainin & Anor* concerned the issue of Sales Tax under the Sales Tax Act 1972 whilst *Re Campal Industries Sdn Bhd* involved the issue of real property gains tax which was payable to the Inland Revenue Department and *Ler Cheng Chye (Liquidator of Castwell Sdn Bhd (In Liquidation)* was once again a case concerning the issue of sales tax. With respect this court cannot accept the inference that these aforesaid cases can be equated to the claim for rates under the LGA which in my decision herein is a rate payable by the owner of a property to the local government.

[35] I have also been referred to the Government Proceedings Act 1956 by counsel for DBKL to state that there is a 'All debts due and claims owing from time to time by any person to the government' under s 10 thereto. It must however be noted that under s 2 of the Government Proceedings Act 1956 that the definition of 'government' refers to 'the federal government and the governments of the states'. There is absolutely no mention of a local government being part of the said definition of 'government' under the Government Proceedings Act 1956 and thus DBKL's counsel contention as to the same is highly misconceived.

[36] I am also unable to discover any case law authority nor have this court been provided with any authority that the rates under the LGA is a federal tax and I agree with counsel for the liquidator that the LGA is not a taxing statute.

[37] On the basis that there is no reference in the First and Third List as set out in the Ninth Schedule of the Federal Constitution to any matters concerning the purview of local government and by implication thereto no reference is made to any assessments or rates under the LGA, it is my view that any assessment or rates imposed under the LGA is not a federal tax.

[38] I am further fortified in my finding that rates are not a federal tax as s 39 of the LGA provides;

> The revenue of a local authority shall consist of —
>
> (a) all taxes, rates, rents, licence fees, dues and other sums or charges payable to the local authority by virtue of the provisions of this act or any other written law.

As well as s 40 of the LGA which states that:

> (1) All moneys received by the local authority by virtue of this act or any other written law shall constitute a fund to be called the local Authority Fund and shall, together with all property which becomes vested in the local authority, be under the direction and control of the local authority.

[39] The said ss 39 and 40 of the LGA thus makes the rates as part of the revenue of a local authority which is to be constituted as a local authority fund which becomes vested in the local authority, and under the direction as well as control of the local authority.

[40] I accordingly hold that after consideration of the LGA and the relevant provisions thereto, that the rates claimable under the LGA is only a rate which is payable to the local authority in this case being DBKL, with the approval of

the state authority, and is therefore not a federal tax which falls within the definition of taxes which are due to the government within the context of the Federal Constitution.

Ranking of debts

[41] As to the ranking of all debts of the same class, this is governed by s 292(2) of the Companies Act 1965 which reads:

> (2) The debts in each class specified in subsection (1) shall rank in the order therein specified but as between debts of the same class shall rank equally between themselves, and shall be paid in full, unless the property of the company is insufficient to meet them, in which case they shall abate in equal proportions between themselves.

Whilst r 92 of the Companies (Winding Up) Rules 1972 provides that 'The liquidator shall examine every proof of debt lodged with him and the grounds of the debt, and shall in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing in Form 59 to the creditor the grounds of the rejection.

[42] It is thus the law that all debts specified in sub-s (1) of s 292 of the Companies Act 1965 shall rank in priority over all other debts of the wound up company.

[43] As this court has held that the rates chargeable by DBKL is not a federal tax, the rates do not fall within the scope of sub-s (1)(f) of s 292 of the Companies Act 1965 which has provided for two situations where the amount of all federal tax assessed shall be paid in priority to all other unsecured debts.

[44] It is my decision that any debts due by the respondent must relate to amounts which are incurred by the respondent prior to the commencement of the winding up of the respondent company in accordance with s 291 of the Companies Act 1965 which, I will state in full, reads as follows:

> (1) In every winding up, subject in the case of insolvent companies to the application in accordance with this act of the law relating to bankruptcy, all debts payable on a contingency and all claims against the company present or future, certain or contingent, ascertained or sounding only in damages shall be admissible to proof against the company, a just estimate being made so far as possible of the value of such debts or claims as are subject to any contingency or sound only in damages or for some other reason do not bear a certain value.
>
> (2) Subject to section 292, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future

A and contingent liabilities as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.

B

[45] In *Majlis Amanah Ra'ayat v Official Receiver, Malaysia* [1984] 1 MLJ 173; [1984] 1 MLRA 151, the Federal Court had in having to decide the question of the effective date for the purposes of determining the debt or liability of an insolvent company in liquidation by order of court had held, C inter alia, held:

the effective date for debts provable in bankruptcy is the date of the receiving order, but when the provisions of s 40(3) of the Bankruptcy Act are applied to an insolvent company by virtue of s 219(1) of the Companies Act the question arises in the case of a winding up by the court as to whether the effective date in relation thereto is D that of the winding up order of the court or of the commencement of the winding up under s 219(2) of the Companies Act.

... that the effective date for the purposes of determining the debt or liability of an insolvent company in liquidation by order of court is the date of the order for E winding up.

[46] In *Majlis Perbandaran Sebarang Perai v Pengurusan Danaharta Nasional Bhd; Ascot Frontiers Sdn Bhd (Third Party)* [2015] 7 CLJ 354 the High Court therein had held that:

F [38] The wordings of ss 146 and 147 of the LGA are clear and unambiguous. Section 146 provides that all rates shall be paid by the owners of the holdings for the time being and s 147 stated that the owner shall be liable for any unpaid rate.

G **[47]** There thus appears to be a conflict between the issue of rates to be paid under the LGA by the owner of a property based on *Majlis Perbandaran Sebarang Perai* which an owner of a property being the respondent herein is obliged to pay as 'owners of the holdings for the time being' and the law on the effective date for the purposes of determining the debt or liability of an H insolvent company in liquidation by order of court where in the case before me the respondent company is still the owner of the property up to 29 January 2020 which is almost 23 years after the respondent was wound up on 10 December 1997 and the filing of the POD which contained a claim by DBKL for the arrears of assessment for the period 1999 to 1 September 2017.

I

[48] Based on the maxim *generalibus specilia derogant* which Gopal Sri Ram JCA (as he then was) had alluded to in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520, I hold that the Companies Act 1965 being a specific statute and which contains provisions in

respect of debts provable in a winding up, excludes the provision of ss 146–147 of the LGA. The said maxim was stated to be in *Language Distributor (M) Sdn Bhd* as follows:

> ... the rule of construction expressed in the maxim generalibus specialia derogant. Where there are two provisions of written law, one general and the other specific, then, whether or not these two provisions are to be found in the same or different statutes, the special or specific provision excludes the operation of the general provision.

[49] In *Luggage Distributors (M) Sdn Bhd* the Court of Appeal had also further stated that:

> Now, there is an important presumption when it comes to construing a legislative enactment. It is this. Parliament is presumed to know the law at any time it exercises its legislative authority upon a subject.

[50] Thus based on the authority of *Majlis Amanah Ra'ayat* and *Luggage Distributors (M) Sdn Bhd* of which this court is bound, I hold that DBKL can only make such claim for the rates up to the date of the order for winding up only.

APPLICATION OF FACTS HEREIN

[51] From the facts before me, as seen in exh LSK2 of encl 2, a request was made by the liquidator to DBKL vide a letter dated 24 April 2019 ('liquidator's 24 April 2019 letter') as to the amount in arrears for the assessment in respect of the property as at 25 March 2019 and for DBKL to file a proof of debt ('DBKL POD') thereto in respect of the same as well as another letter to the OR dated 5 August 2019 seeking for all documents and records kept by them in respect of the respondent company ('OR's 5 August 2019 letter'). However, prior to the said liquidator's letter to DBKL, it would appear that DBKL had filed their POD with the OR on or about 8 February 2018 as shown in exh LSK5 of encl 2 which is a letter dated 6 February 2018 from DBKL's solicitors Messrs Azaine & Fakhrul enclosing DBKL's POD to be lodged with the OR.

[52] There is however no evidence presented to this court that the Jabatan Insolvensi Malaysia had accepted or rejected the said POD filed by DBKL.

[53] It would also appear from the facts before me that the liquidator was not aware of the POD filed by DBKL which had resulted in the liquidator's 24 April 2019 letter. As a result of this the liquidator claims it had advertised on

5 February 2020 for a creditors meeting and for the creditors to lodge their POD's by or before 20 February 2020 and that they had only received a total of 4 POD's including that of DBKL.

[54] It is thus my finding, from the facts before me, that the DBKL POD was filed with the OR before the expiry of the time fixed by the liquidator for the proving of debts.

[55] Pursuant to s 237(3) of the Companies Act 1965, I accordingly answer the question posed in encl 1 that DBKL is only entitled to the payments of the assessment up to the date of the winding up order ie 10 December 2997 in respect of the property and thus DBKL's POD for RM55,030 for period 1999 until 1 September 2017 for unit 1, No 1, Level 20th floor, Block A aka Bangsar Tower/Menara Bangsar bearing postal add 299–20–1, Jalan Maarof, Menara Bangsar, Bukit Bandaraya cannot under the law be claimed by DBKL from the respondent. I further order the respondent to pay costs of RM5,000 to be paid to the applicant herein.

Notice of motion allowed.

Reported by Ashok Kumar